



Try, try again

FCC Takes Another Stab at Net Neutrality

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The FCC’s May, 2014 monthly meeting was not ordinary. Protestors camped outside the Commission’s headquarters and shouted slogans in its meeting room. Democratic Commissioners showed signs of open rebellion against their Chairman. Republican Commissioners stood in blunt opposition to the Chairman. And everyone, including the Chairman, urged fervently that “the future of the Internet” was at stake.

Against this backdrop, Chairman Wheeler announced the FCC’s latest proposal for Open Internet rules. Caught between the demands of his political constituency and legal requirements set by the U.S. Court of Appeals for the D.C. Circuit, he attempted to walk a narrow and difficult path.

And by a 3-2 vote (with two of the three Commissioners in the majority expressing serious reservations), the FCC followed the Chairman on that path: it adopted a [Notice of Proposed Rulemaking \(NPRM\)](#) soliciting comments on the latest approach to “net neutrality” regulation.

Highlights of the *NPRM* include proposals to:

- continue the “no-blocking” rule, first adopted in 2010, prohibiting Internet service providers (ISPs) from blocking subscribers’ access to certain content. But that rule would now be supplemented to allow ISPs some opportunity to provide content providers (e.g., Netflix, Amazon) enhanced, higher speed access to subscribers, presumably for a fee;
- prohibit only “commercially unreasonable” practices in the ways ISPs treat different content on their net-

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Novel approach to 3.5 GHz licensing

Here’s an Idea, Good Buddy: Citizens (Broad)band Radio!

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As we have known for years, the FCC – and the rest of us – face a daunting problem: too many spectrum users and not enough spectrum. Even the most ambitious reallocation (and associated re-packing) plans offer at most limited and impermanent responses to the problem. Now [the FCC has a new idea](#) that could completely remake how the world handles spectrum and, in the process, dramatically increase the efficiency with which spectrum is used.

But the FCC’s plan to create a new “Citizens Broadband Radio Service” (CBRS) in the 3.5 GHz band sure has a lot of moving parts.

The plan is, in a way, simplicity itself: it calls for spectrum users to take turns. But while the basic concept may be kindergarten simple, its implementation is not, by a long shot. After all, not all users’ communications are equally urgent or important. Is there a way to get the more urgent and important stuff through first, and still give everybody else a fair shot?

After a year and a half, a previous [Notice of Proposed Rulemaking](#), a follow-up public notice, hundreds of comments, two full-scale workshops, and too many meetings to count, the FCC has come up with a highly promising approach that is almost ready to test.

The CBRS would be established at 3550-3650 MHz, possibly combined with the adjacent 3650-3700 MHz band. This is an odd choice, at first glance. The incumbents at 3550-3650 MHz are high-powered ground and airborne military radars, and earth stations that receive satellite signals – on the face of it, poor candidates for sharing. The 3650-3700 MHz segment is widely used for delivery of commercial broadband service. Both bands

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Not all spectrum is created equal

FCC Updates Spectrum Holding Policies

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We hold these truths to be self-evident, that not all spectrum is created equal, that they are endowed by their Creator with certain unalienable-but-unequal attributes, that among these are frequency, wavelength, and the transmission of energy. That to secure rights to use spectrum, Government agencies are instituted among Men, deriving their just powers from the Communications Act . . .

That's right. Not all spectrum is created equal. No need to feel bad for the spectrum. We doubt it cares. Spectrum is utilized for a countless number of applications including radio, television, wireless Internet, mobile telephony, even cooking your food. Certain spectrum bands are just better suited for some tasks than others.

More specifically, for mobile telephony/broadband applications, low-band (*i.e.*, below 1 GHz in frequency) spectrum offers better signal propagation for enhanced geographic coverage than high-band (*i.e.*, above 1GHz) spectrum, but high-band is better at transmitting larger amounts of data (albeit over shorter distances). Low-band spectrum, which wireless carriers covet due to better coverage capabilities and lower deployment costs, is in shorter supply than high-band spectrum. As directed by Congress and the Communications Act, the FCC is responsible for allotting spectrum among various uses and users. According to the FCC, ensuring access to low-band spectrum by multiple carriers helps to enhance competition and is, therefore, desirable.

As demand rises – particularly for spectrum likely to become available in the impending Incentive Auctions – the FCC has been confronted with conflicting calls for that soon-to-be-available spectrum. And in a recent [Report and Order](#), the Commission has announced its decision, based on key differences between low- and high-band spectrum and the implications these differences have for competition. The result: the FCC has updated its “spectrum screen” policies which serve as a gauge of acceptable levels of spectrum holdings (including treating low-band spectrum holdings as an “enhanced factor”) in connection with secondary market transactions; it has also established new spectrum holding policies for the upcoming low-band spectrum Incentive Auction. We'll discuss each in turn.

The Updated Spectrum Screen

For mobile telephony/broadband services, the FCC has utilized different rules and policies over the years to prevent any one entity from having access to too much spectrum. We won't get into its past policies, but eventually the FCC arrived at a “case-by-case” review coupled with application of an “initial screen” to gauge whether an entity's spectrum holdings would be of particular concern. This “spectrum screen” is triggered if a proposed transaction would result in an entity acquiring rights to approximately one-third or more of the total spectrum “suitable and available” for mobile telephony/broadband services in a particular market (*e.g.*, a county). A transaction triggering the spectrum screen is not automatically precluded; it is, however, subject to closer scrutiny and its applicants must demonstrate that the greater concentration of spectrum rights is still in the public interest.

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Even nationwide carriers need a little reasonableness.



FCC Pressed for More Definitive Roaming Standards

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The rates that carriers charge one another for providing roaming service have never been subject to precise regulatory limits. Voice roaming has historically been treated as subject to the traditional common carrier standard, *i.e.*, voice roaming rates must be “just and reasonable” and “not unreasonably discriminatory”. And, since 2011, data roaming service – which the FCC has chosen to treat as an “information service” not subject to common carrier regulation – must be available on “commercially reasonable” terms. Neither standard lends itself to ready quantification, a fact which major carriers have taken advantage of.

As it turns out, this lack of clarity has worked to the disadvantage of at least one big carrier as well as many smaller ones.

But now, efforts on a couple of fronts are being made to graft some useful flesh onto the historically bony standards. A small carrier has filed a complaint alleging that Verizon’s roaming rates, both voice and data, are unreasonable (commercially and otherwise) and discriminatory. And, more recently, T-Mobile USA, Inc. (T-MO) – by no means a small fish in the telecom pond – [has asked the FCC to issue an expedited declaratory ruling](#) about how the term “commercially reasonable” should be interpreted in the context of data roaming rate negotiations.

The FCC’s rules have, since the very inception of cellular service, required carriers to offer voice roaming to other carriers on “just and reasonable” and “not unreasonably discriminatory” terms, as required by the Communications Act. When there were hundreds of independent carriers who all needed to be able to have their customers roam on each others’ networks on a reciprocal basis, the market easily mandated that carriers would offer each other reasonable rates. Everybody needed each other.

Not so today. Only the FCC rules incent the biggest carriers to offer roaming at all, and the notion of what constitutes a “reasonable” rate is very much in the eye of the beholder. The chorus of wails from small carriers and their representative associations in recent years about the lack of reasonable roaming has often been acknowledged by the FCC, but the FCC’s response has always been: if you’ve got a problem, your recourse is to file a complaint

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With more squeeze to come

Wireless Mikes Caught in Spectrum Crunch

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Wireless microphone users are fighting for spectrum. Here is why – and what the FCC is doing about it.

Anyone who watches TV or attends live shows knows about wireless microphones: those black or silver things the performer holds, plus a lot more equipment backstage. Until recently, few people gave these devices much thought – not even the FCC. Not until the 2009 digital TV transition that transferred 108 MHz of TV spectrum to other uses.

Most wireless microphones operate in vacant TV channels. The old analog TV rules required certain TV stations to be spaced far apart – not just those on the same or adjacent channels, but also some that operated many channels apart. That left plenty of room for microphones. But digital TV stations can safely be squeezed more closely together. That made possible the 2009 TV spectrum repacking, which cut the numbers of empty channels and left microphone users scrambling for spectrum, especially in microphone-dense areas like the Broadway theater district, while manufacturers struggled to squeeze more microphones into less spectrum.

The FCC added a complication by allowing unlicensed “TV white space” (TVWS) data devices into most of the same vacant TV channels that wireless microphones use. Until the digital repacking there would have been room for both, but the subsequent shortage set off acrimonious disputes at the FCC.

There was another complication. Back then many wireless microphones operated illegally. FCC rules required a license, but limited license eligibility to certain narrow classes of users: broadcast stations and networks, TV and film producers, cable companies, and a very few others. Lots of other people used wireless microphones anyway, including Broadway theaters, outdoor concerts, churches, high-school performers, and – famously – the FCC’s own meeting room.

Rather than enforce against the violators, the FCC instead took steps to make most of the violations go away.

A [2010 order](#) granted a blanket waiver allowing **unli-**

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\$10.5 billion reserve price!

FCC Sets Date and Rules for AWS-3 Auction

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Hot on the heels of its March 31, 2014 adoption of service rules for the long awaited AWS-3 service, the FCC wasted no time issuing a [public notice and request for comments](#) in which it set a date – **November 13, 2014** – for the auction of the new spectrum and proposed rules to govern the auction. (Last April [we reported](#) on the structure of the newly-authorized service and the license blocks that will be up for sale.)

If everything on the AWS-3 front looks like it's moving fast, that's because it is. The haste is necessitated by the looming statutory date of February, 2015 by which the Commission must have not only completed the auction but also actually issued the licenses to the winning bidders. The auction notice is designed to set the stage for the auction itself.

The auction will follow the typical FCC auction format, including the now-customary anonymous bidding feature.

This relatively recent wrinkle to the auction process prevents bidders from knowing who is bidding on what until after the auction is over. A few features are of particular note:

The “reserve prices” for the auction were tentatively set at \$10,066,326,600 for the paired 1755-1780/2155-2180 MHz licenses and \$579,775,900 for the licenses in the 1695-1710 MHz band. (A “reserve price” is the minimum the FCC must take in for the auction to be declared valid. If that price is not met, the auction results are invalidated and the Commission has to start all over again.) While the \$10 billion reserve is certainly achievable, it seems high to us as a floor for auction receipts.

To determine the respective reserve prices, the FCC (as required by the governing Commercial Spectrum Enhancement Act (CSEA)) had to begin with the NTIA's estimate of the cost of relocating existing Federal users out of the band, and then take 110% of that amount as the floor which must be recovered for that band. The unpaired band relocation costs were estimated at \$527,069,000, so a simple arithmetic operation yielded the \$579,755,900 reserve price.

The calculation for the other band was more problem-

atic, and perhaps more controversial. Only the *lower* half of the paired channels in the 1755-1780/2155-2180 MHz bands are subject to the cost recovery requirement set by the CSEA, so the FCC theoretically needs to recover only the costs of relocating Federal users from that portion of the spectrum being auctioned. NTIA estimated that cost as \$4,575,603,000, 110% of which would be \$5,033,163,300. However, the FCC decided that because this lower band comprises only half of the entire licenses being auctioned, it needed to *double* the recovery figure for the entire licenses, apparently to ensure that half of the minimum recovered from the sale of these licenses would be sufficient to

cover the statutory minimum for the lower band alone. That's how the reserve price for this band reached a whopping \$10.066 billion.

While we can appreciate the Commission's punctiliousness about ensuring that it meets the statutory requirement, its

interpretation here seems questionable. Surely Congress was chiefly concerned that the FCC recover a certain amount for this band and was not worried at all about what it took in for other bands not identified in the statute. The FCC could presumably have met the statutory mandate by assigning a reserve price of \$5.033 billion to the 1755-1780 band alone and declaring that the paired band was thrown in for a nominal additional amount. The prices bid in the auction would, of course, reflect the full market value of both paired bands, but the bidders (and the Commission) wouldn't be saddled with what seems to us to be a dauntingly high reserve. No one can forget the failure of the 700 MHz D Block auction a few years ago where the auction failed to reach a hefty reserve price level, thus throwing the subject band back to square one.

We do expect a healthy amount of interest in this spectrum, but the prospect of a significant amount of 600 MHz spectrum coming on the market later next year may dampen prices at least a bit. It would be a shame if, in its zeal to rake in a king's ransom in bids, the FCC were to fail to achieve the reserve and gets nothing. This prospect is especially scary given the statutory deadline for assigning the licenses. What happens if the

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If everything on the AWS-3 front looks like it's moving fast, that's because it is.

Relief under TCPA, TCIA limited

Telecom Carrier Ruled Not Liable for Customer's Telemarketing Activities

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Increasingly, telephone carriers may find themselves unexpectedly on the wrong end of lawsuits alleging violations of the telemarketing laws. Fortunately, at least one federal judge has recognized that such suits are off the mark.

Unsolicited marketing calls are like weeds – nobody likes them, they seldom do any good, and they're almost impossible to get rid of. But Congress tried. In 1991 it enacted [the Telephone Consumer Protection Act](#) (TCPA), which perhaps most famously created the "Do Not Call" list. The TCPA also created a "private right of action" that allows consumers – individually or, increasingly, as an entire class – to sue telemarketers who break the rules.

That right to sue can be effective when directed against the proper targets (*i.e.*, the wrongdoing telemarketer), but it can also be misdirected toward blameless parties, with unhappy results – much like a flame thrower which is effective at killing the occasional dandelion, but which wreaks havoc when pointed at the rose bushes. The universe of innocent bystanders in the TCPA context includes telephone carriers. You might think that no penalty could legitimately be imposed on carriers whose only involvement is the happenstance that a telemarketer used the carriers' services. But aggrieved consumers (and their deep-pocket-seeking counsel) probably think otherwise.

Take, for example, the case of Flowroute, a telecommunications provider.

The plaintiff there had received a single telemarketing call on his cellphone from a telemarketer in the Philippines, so he brought a TCPA action in the U.S. District Court in Houston. In addition to naming the telemarketer as a defendant, the plaintiff alleged that Flowroute was jointly and severally liable for the violation as well. That's because, having provided the telemarketer with the underlying phone service for the call and the Houston-area local number used, Flowroute had – in the plaintiff's view of things – conspired to aid and abet the telemarketer in its violation.

The plaintiff tried to bulk up his case by seeking class action status, with an aggregate claim of at least \$5 million in damages. Since – again, strictly according to the plaintiff – Flowroute was supposedly jointly and severally liable, Flowroute would be left on the hook for the whole \$5 million if (a) the plaintiff were to prevail and (b) the Philippines telemarketer were to be dismissed from the case (because of defective service of process in the Philippines).

Faced with potential multi-million dollar liability, many defendants might be open to settlement overtures. Litigation is, after all, a notoriously costly and uncertain process. Even when a targeted defendant is confident that it should not – in a just world – be held

liable, a considerable settlement can sometimes make sense as a means of avoiding the expensive distraction of litigation. The fact that settlement provides a tempting path of least resistance even for the most innocent of defendants is not lost on class action plaintiffs.

Flowroute, however, confronted the plaintiff's claims head-on by asking the Court to toss them. Flowroute pointed out that the TCPA imposes liability only on entities that "make a call" which, obviously, Flowroute had not done. Moreover, the legislative history shows that Congress did not intend for liability to be imposed on the carrier whose role was limited to providing the network used to make telemarketing calls. Flowroute's motion to dismiss also demonstrated that there was no basis in the statute or case law for carriers to be liable as conspirators for aiding or abetting a TCPA violation.

[The Court fully agreed with Flowroute's arguments.](#) In a decision that should gladden carriers everywhere, it held that the TCPA imposes liability on entities that make a prohibited telemarketing call, not on the underlying carrier:

Plaintiff cites no legal authority to support the argument that, without more, the TCPA imposes liability on the telecommunications carrier whose

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The right to sue can be misdirected toward blameless parties, with unhappy results.



They're heeere!

New gTLDs Are Now Available for Registration

**Put your thinking caps on, review the ICANN list,
and get started – NOW is the time.**

We have [previously alerted our readers](#) to the impending arrival of new generic Top Level Domains (gTLDs) on the Internet and the opportunities that their arrival will be opening up. And now the time has come – or, at least, it has come for some new domains, with others to be rolling out periodically for the foreseeable future.

Anyone contemplating expansion of their Internet presence into any of the new gTLDs should already be regularly reviewing the [website of the Internet Corporation for Assigned Names and Numbers \(ICANN\)](#). That's where ICANN lists the opening and closing dates for the various filing periods (e.g., Sunrise, Landrush, etc.) for each new gTLD as it becomes available.

We'll be keeping an eye on the ICANN list as well, looking for new gTLDs that, in our purely subjective view, might have some particular interest for our readers. When those pop onto our radar screen, we'll post about them at our blog site, [CommLawBlog.com](#). This will be an on-going process. There are still more than 1,500 gTLD applications working their way through the ICANN system, so attention must be paid to periodic developments for months, if not years, to come.

Our blog posts aren't intended to substitute for readers doing their own research. Far from it. Rather, it's one way for us to continue to poke, prod, cajole, wheedle, nudge and otherwise encourage folks to devote a bit of their own time and attention to the new gTLD universe and the potential it holds for them. *Important disclaimer:* We will not be reporting on each and every new gTLD that comes down the pike; rather, just the ones that catch our eye for one reason or another. So any reader looking for the perfect gTLD(s) should **not** be relying on us here to post all available gTLDs. (And we should probably also remind everybody to take a look at the fine print disclaimer on Page 2 of every *FTL*, not to mention the [Disclaimer that applies to all posts on CommLawBlog.com](#).)

Below is [our preliminary, abbreviated list here](#) (which reflects new gTLDs posted by ICANN through

May 9). [The complete ICANN list can be found here](#), so put your thinking caps on. To get you started, here are a couple of thoughts we had.

.rocks, **.country**, **.farm** – These are total chip shots. Any rock radio station should see the potential of having “[YOUR CALL SIGN].rocks” as a domain name. Ditto for country stations and “[YOUR CALL SIGN].country”. **.farm** could easily be used for a station with agriculture-focused programming. You could also use promotional identifiers (e.g., “DC101”) instead of your call sign there, too.

[Timing considerations: If the term you'd like to use is a registered trademark, bear in mind that the “Sunrise” period – during which registered trademark holders who have placed their marks in ICANN's Trademark Clearinghouse get a head start on the Great Unwashed – is set to close in June for “.rocks” and “.country”. The Sunrise period for “.farm” has already closed, but look for it to be generally available shortly.]

.camera, **.photos**, **.pics** – Many businesses, including broadcast stations, encourage the submission of photos to their websites to help in creating a bond between the businesses and their customers or audience. They might be interested in “.camera”, “.photos” or “.pics” for an easily identifiable domain name to which pictures can be sent and on which they can be easily accessed. (Think “[YOUR CALL SIGN].pics”, for instance.)

[Timing considerations: The Sunrise period for all three of these has passed, so they are open and available right now!]

Geographic domains – Do you have a station in New York City? Think about “.nyc”. It's now in Sunrise and available to trademark owners who have registered their marks with the ICANN Trademark Clearinghouse. “.LONDON” (also currently in Sunrise), “.BERLIN”, “.tokyo” and “.MOSCOW” are all

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Our goal is to prod folks to devote a bit of their own time and attention to the new gTLD universe.



(New gTLDs - Continued from page 6)
coming online, too.

“.buzz”, “.webcam” – If you’re a broadcast station and you want to establish (or reinforce) the fact that you’re on top of what’s happening, how about “.buzz” – as in “TheCommLawBlog.buzz”? Do you try to attract eyeballs with (or to) your own webcam? You might think about “.webcam”.

[Timing considerations: “.buzz” is open for general registration through some (but not necessarily all) registrars; the “.webcam” Sunrise period closed May 30.]

“.media”, “.report”, “.review”, “.technology”, “.today”, “.community” – Any of these could provide useful domain names to associate with specific types or programming already on the air. Looking for something more whimsical with image-building potential? How about “.ninja” or “.guru” or (probably for the edgier among you) “.wtf” or “.sexy”?

[Timing considerations: “.media”, “.report”, “.community” and “.wtf” are all currently in their respective Sunrise periods. “.guru”, “.sexy”, “.technology” and “.today” are all available, well, today.]

You get the idea.

And these are just the obvious ones that even a lawyer/blogger could identify without breaking a sweat. There are a couple hundred more domains already available to work with, and nearly 2,000 more on the way. It’s a tremendous opportunity to look ahead, think creatively – both inside and outside the box – and start planning the ways you will interact with Internet users (*i.e.*, just about everybody) in the coming years.

So take some time to go through both our [subjectively abridged list](#) or the complete ICANN list of [new gTLDs that have already made it through the application process](#), or the unabridged master ICANN list which includes [nearly 2,000 proposed domains still under consideration](#). Highlight the domains that might work for you and make note of their respective roll-out dates. (Helpful tip: By clicking on any of the domain names on the ICANN

site, you can get a drop-down menu of any relevant documents – such as detailed start-up policies – laying out terms and conditions applicable to that particular domain.)

Once you’ve assembled a list, sit down with the other Big Thinkers in your company (that could include management, promotions folks, creative staff, whoever might be able to contribute usefully to a vision of your future operations), put your thinking caps on and get going. You might also want to call on our gTLD Team (identified below) for suggestions and guidance. Team members have been hip-deep in the gTLD application process and they have already pored over the full list of new gTLDs that have been applied for. Not only can our gTLD Team help in identifying new gTLDs useful for your purposes, but they can also help navigate the registration process. For anyone looking to act quickly, that may be crucial: not all new gTLDs are available through all registrars.

Bear in mind that there’s a defensive component here as well.

You should also bear in mind that there’s a defensive component here as well. Even if you yourself might not want a particular domain name based on, say, a promotional phrase you use heavily, consider whether you would be happy if your competitor down the street – or anybody else, for that matter – were to register a domain name based on that phrase.

It’s especially important to focus sooner rather than later if you’ve got a registered trademark that you’d like to use in a domain name. As [we have previously advised](#), there are a number of ways by which registered trademark holders can get a leg up in the domain name registration process, so if you’ve paid attention to our previous suggestions and you’ve registered one or more marks, now’s the time to take advantage of them.

And if you’ve got any questions about the new domain name process and how it all works, don’t hesitate to let us know. Again, if you need help picking, and/or registering domain names in, any of the new gTLDs, let us know (we’re monitoring registrations). Our gTLD Team includes [Kathy Kleiman](#) (who participated in the drafting of numerous New gTLD rules), [Bob Butler](#), [Kevin Goldberg](#), [Davina Sashkin](#), and [Jon Markman](#).



Clearing the tracks for PTC

New Review Process Established for Railroad Pole Construction

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A major regulatory barrier to the implementation of Positive Train Control (PTC) has been removed: the [Advisory Council on Historic Preservation \(ACHP\)](#) has adopted a “Program Comment” to govern review and approval, under the National Historic Preservation Act (NHPA), of railroad wayside poles and infrastructure. And at the same time, the FCC has entered into Memoranda of Understanding with all of the major freight railroad carriers, absolving those carriers of any prior failure to comply with NHPA requirements in the construction of towers for PTC. In return, the carriers have adopted compliance plans and agreed to a joint contribution of \$10 million to a “Cultural Resource Fund.” As a result, railroad carriers who must implement PTC now have a clear path for the construction of the thousands of new antenna poles needed for PTC. Those carriers must, however, be vigilant in following the new procedures set out in the Program Comment.

*The new procedures
are extensive
and detailed.*

In response to a 2008 railroad accident in Chatsworth, California that claimed 25 lives, Congress enacted the Rail Safety Improvement Act of 2008 (RSIA). The RSIA requires freight and certain passenger railroads to deploy interoperable PTC systems by December 31, 2015. PTC systems generally use radio signals between trains and a land-based network to prevent certain railroad accidents. Once deployed, PTC systems will be capable of controlling or stopping a train when a train operator is unavailable or unresponsive and action is required to avoid a derailment, incursion into a work zone, certain train-to-train collisions, or movement through a switch left in the wrong position.

Despite delays arising from spectrum acquisition issues, many railroad carriers, especially the major freight railroads, have been working to meet the 2015 deadline for PTC implementation. That implementation will require the construction of “wayside poles,” *i.e.*, vertical structures used to support fixed wireless antennas within the railroad right-of-way alongside existing tracks. Approximately 30,000 wayside poles will be required nationwide, of which at least 10,000

have already been installed.

What’s this got to do with the FCC, you ask? All of those poles will have antennas on them. Sections 1.1307 and 1.1312 of the FCC’s rules require that, prior to construction, the railroads ascertain the environmental impacts of facilities constructed in connection with FCC-issued authorizations. That entails review pursuant to Section 106 of the NHPA, under the relevant procedures set forth by the ACHP and the FCC. Environmental and historical analyses of tower sites must be made and coordinated with State Historic Preservation Officers (SHPOs) and Indian tribes affected by the proposed construction. Filings must then be made with the FCC.

And there’s the rub: when the railroad carriers expressed concern that FCC processing was not going quickly enough to meet the 2015 deadline, the FCC responded by pointing out that the carriers were not even in compliance with

NHPA requirements for prior review of pole construction. In other words, the carriers learned that they were potentially subject to large FCC forfeitures (for their previous violations), and the FCC learned that it faced a big problem reviewing and approving PTC pole construction by the statutory deadline. So in May, 2013, a deal was cut: the carriers would temporarily stop constructing poles while they worked with the FCC, SHPOs, affected tribes and other stakeholders to come up with new procedures under the NHPA for review and approval of thousands of poles in a short amount of time.

And voilà, one year later (!) the deal has come to fruition: the new Program Comment (effective immediately) is designed to: (a) tailor and expedite the historic preservation review process under Section 106 for PTC-related wayside poles and infrastructure in the railroad right-of-way and (b) ensure that the effects of the poles and infrastructure on historic properties are appropriately considered in compliance with the NHPA.

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(Roaming Charges - Continued from page 3)
under Title II of the Act.

Last Fall, one small carrier finally bit the bullet and filed a formal complaint against Verizon Wireless, alleging that the roaming rates being charged or offered by Verizon were unreasonable and discriminatory. (Full disclosure: This author represents the complainant.) Because non-disclosure agreements cover the terms of the roaming offers and agreements, the actual terms at issue are not available to the public. But the complainant (NTCH) compared Verizon's rates to rates offered by Verizon to its retail customers and to mobile virtual network operators (MVNOs) to demonstrate that the roaming rates for roaming are seriously out of whack.

In addition to challenging Verizon's voice, SMS and toll charges, NTCH also challenged Verizon's rates for data roaming as being "commercially unreasonable." As noted above, in contrast to its treatment of voice roaming as a common carrier service subject to a "just and reasonable" standard, the Commission has so far taken pains to characterize data roaming as an "information service" subject to the similar, but supposedly distinct, "commercially reasonable" standard. This effort to avoid imposing Title II common carrier regulation is in keeping with the FCC's tortuous effort to define data service as non-common carrier.

The Commission has been performing this tightrope walk for nearly a decade, imposing various common carrier-like fairness obligations on information service providers without actually reclassifying them as common carriers. So far, the FCC has largely gotten away with this balancing act, but the courts have been looking with less and less favor on this have-your-cake-and-eat-it-too approach. At least in the case of data roaming, however, the [D.C. Circuit has approved the fine line](#) the FCC has drawn: you can require data roaming rates to be commercially reasonable, but don't try to insist that they be just and reasonable like common carrier rates must be.

Carriers as large as T-MO are complaining about roaming rates.

In the real world it has gotten tough for carriers and their lawyers to discern the difference between a rate that is merely "reasonable" and one that is "commercially reasonable." The [Data Roaming Order](#) permits complainants to file consolidated complaints regarding both voice rates (under Title II) and data rates (under Title III). NTCH did so, and its complaint will presumably help to resolve this conundrum. NTCH also petitioned the Commission to require roaming rates to be made publicly accessible, a measure which in itself would help to ameliorate the problem, but the FCC has thus far not acted on the petition (or even solicited comments about it).

In the meantime, T-MO has independently taken up the challenge of getting guidance on how the "commercial reasonableness" of data roaming charges is to be measured. It is seeking to avail itself of the alternative vehicle for relief suggested by the Data Roaming Order in the event of disputes: a petition for declaratory ruling. Using metrics similar to those relied on by NTCH, T-MO seeks a Commission ruling that "wholesale" roaming rates (*all* roaming rates are presumably wholesale, but this is how T-MO has configured its request) should be subject to certain benchmarks: retail rates, rates charged to foreign carriers for roaming, rates charged to MVNOs, and rates competitively negotiated with other carriers. A roaming rate which is seriously in excess of such rates would, in T-MO's view, be presumptively commercially unreasonable. It should come as no surprise that even carriers as large as T-MO are complaining about roaming rates; until it was bought by AT&T earlier this year, Cricket was complaining about the same thing.

The FCC has put the T-MO petition out for comment, eliciting responses from the carrier community on this key subject. Comments are due by **July 10, 2014** and replies by **August 11**. As mobile traffic becomes more and more data-centered and less and less voice-centered, the need for reasonable (excuse me, *commercially* reasonable) roaming rates is becoming critical to the CMRS industry. With NTCH's complaint and T-MO's petition, the issue has now been teed up for FCC action.



(Positive Train Control - Continued from page 8)

The procedures mandated under the new Program Comment are extensive and detailed. A summary is [available here](#) and the entire Program Comment is a [available here](#). Be forewarned: the procedures are remarkably complex, so much so that the Wireless Tele-

communications Bureau has explicitly invited questions from carriers regarding the application of the new procedures to the specific circumstances that carriers face.

Carriers with questions about either spectrum acquisition for PTC or pole construction can call us as well!



(Citizens Broadband Radio Service - Continued from page 1)
have long been regarded as so sensitive that they are closed to most unlicensed devices.

The FCC nonetheless thinks it has a way to introduce new users to these frequencies without causing interference either to incumbents or to each other. The details appear in a [Further Notice of Proposed Rulemaking \(FNPRM\)](#).

Like an [earlier plan](#), the proposal would establish three priority levels to govern access to the shared spectrum – but there the similarities mostly end.

The new plan would give the highest priority to **Incumbent Access** (IA) use. As the name suggests, IA would be limited to incumbent users. They would be permitted to operate at any time, and would be free to cause interference to anybody (except, in some cases, to each other). They would also enjoy protection against interference from everybody else, using geographic “exclusion zones” within which no one else could operate on the incumbents’ frequencies.

Next in the pecking order would be **Priority Access** (PA) use. PA users would have to protect the incumbents, and would in turn be protected against interference from General Authorized Access users (discussed below). PA use would be auctioned in ways that are novel for the FCC. Auction areas would be small census tracts – about 74,000 of them nationwide, each with only a few thousand people, generally following political boundaries such as city lines. Each auctioned license would cover 10 MHz and be valid for only one year. Bidders would be free to aggregate licenses so as to cover a greater geographic area, or more bandwidth (up to 30 MHz) or more time (up to five consecutive years in a single auction). The FCC would conduct auctions for the entire system annually.

The lowest priority would be **General Authorized Access** (GAA), providing access, free of charge, to spectrum not occupied by the two categories above. How much spectrum remains available for GAA will depend in part on the success of the PA auctions. But the FCC proposes limiting PA auctions to no more than 50% of the bandwidth in each census tract, after accounting for the incumbents, with the other 50% reserved for GAA. Still, because multiple users may compete for that 50%, no single user could be assured of getting a signal through quickly.

Certain “critical facilities” such as hospitals, public safety organizations, and local governments would get an advantage: they could reserve up to 20 MHz of GAA spectrum, but for indoor use only. Other GAA users would not be

permitted to operate on those frequencies in those buildings. The FCC expects the building walls to largely isolate the users in these critical facilities from the great mass of other GAA users outside.

The key to making all of this work is a Spectrum Access System (SAS) that, as envisioned by the FCC, will manage all users (except the incumbents) on the fly, in real time. Every device will have to check in with the SAS, report its own location, request permission to transmit, and wait to be assigned a specific frequency. The SAS’s job will be to keep everybody off the incumbent spectrum in the exclusion zones, prioritize PA users, and assign GAA slots to others. Although a PA license would entitle the user to 10 MHz (or more) at any time, it would not specify a particular slot. For maximum flexibility, the SAS would be able to move each user’s actual operating frequency around in the band as needed.

The technical demands on the SAS are unprecedented.

The proposed technical rules are complex; those interested will have to plow through the [FNPRM](#). Power limits will be higher in rural than in non-rural areas, and higher still for fixed systems, ranging overall from 1 watt up to 200 watts EIRP. But tighter controls will apply at the boundaries of a license area. A licensee that buys just one or a few census tracts will often be close to a boundary, and so in practice may have less power available. Presumably the SAS will set power so as to protect the boundaries.

Taken together, the technical demands on the SAS are unprecedented. The FCC describes it as an extension of the database that controls TV white space devices, but the tasks that would be assigned to the SAS would be vastly more complex. The design and operation of a successful SAS will be a major technological achievement.

All of these considerations listed here, plus a great many more, are open to comment.

Of the FCC’s earlier proposal for the 3550-3650 MHz band, we said, “Not content with crossing that tightrope, the FCC wants to juggle at the same time.” Now it wants to do the whole thing balancing tiptoe on a unicycle. But if the FCC and its industry participants can bring this off, and then extend the same ideas to other bands, the day when we finally exhaust the spectrum may not come as soon as we had feared.

The deadlines for comments are July 14, with replies due by August 1. Anyone wishing to comment now may do so by uploading their submissions in Proceeding No. 12-354 at the FCC’s [ECFS filing site](#).



(TCPA Decision - Continued from page 5)

systems are used by another to make an unlawful call to a cellular phone. This Court's research has revealed none.

The Court also concluded that no basis exists in the TCPA or elsewhere to impose joint and several liability on Flowroute for "conspiring" with the telemarketers to violate the TCPA.

Undeterred, the plaintiff then amended its complaint (with the Court's permission) to take a different tack relying not on the TCPA, but on the separate but somewhat related [Truth in Caller ID Act](#) (TCIA). The TCIA makes it unlawful to "cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongly obtain anything of value." In his amended complaint, the plaintiff argued that Flowroute's provision of a local Houston telephone number to the Philippines-based telemarketer was intended to mislead the plaintiff into answering unsolicited telemarketing calls and that Flowroute was, as a result, liable for private damages under the TCIA.

Flowroute moved to dismiss the amended complaint, arguing that, unlike the TCPA, the TCIA does **not** provide individuals with a private right of action. Rather, the TCIA allows only the government to pursue penalties for any alleged violations. Moreover, the legislative history demonstrates that the TCIA was intended to protect legitimate Caller ID management services, such as provision of local telephone numbers for telemarketers to use. Indeed, the use of a local number facilitates compliance with FCC regulations that require that the called party be able to readily return a call to the same number in order to make a "do-not-call" request.

[The Court agreed with Flowroute again](#), holding that neither the plain words of the TCIA nor its legislative history reflect any Congressional intent to create a private right of action to enforce the TCIA. The Court dismissed, with prejudice, the amended complaint in its entirety, a decision which effectively barred the plaintiff from bringing any further suits against Flowroute in connection with these claims.

The Court found no private right of action to enforce the TCIA.

The Court's two rulings reflect judicial endorsement of two important points that are good news for telecommunications carriers:

Carriers that do nothing more than provide the underlying telephone service (including telephone numbers and Caller ID management services) are not directly or indirectly liable for any TCPA violations by a telemarketer, nor are they joint and severally liable under a conspiracy or aiding/abetting theory; and

There is no private right of action to enforce alleged violations of the TCIA. Unlike the TCPA, individuals cannot seek to recover damages under the TCIA.

These points are especially important in light of the burgeoning cottage industry of TCPA-based litigation. Brandishing the TCPA-created private right of action, eager plaintiffs are flocking to file class action suits against entities large and small. Those efforts have almost certainly been goosed by reports of multi-million dollar settlements of TCPA suits brought against the likes of

[Bank of America](#) and [Papa John's](#). The Flowroute case suggests that TCPA plaintiffs are trying to shake similar settlements out of unsuspecting carriers by invoking new theories of liability.

Fortunately, the Flowroute decisions are solid evidence that the TCPA was not intended to be used against carriers in this way. Those decisions provide a useful road map for other carriers confronted by the TCPA plaintiffs. And they highlight the need for all companies to redouble their efforts to comply with [the requirements of the TCPA](#) and the TCIA in order to reduce exposure to potentially significant liability.

[Editor's Note: We are pleased to report that our author, Paul Feldman, as well as our colleagues Jamie Troup and Cheng Liu, represented Flowroute in its successful effort to have the TCPA, and then the TCIA, claims against it dismissed. Jamie, Cheng and Paul developed and presented the prevailing arguments. Of course, past performance is no guarantee of future results.]



(Spectrum Holding Policies - Continued from page 2)

Pursuant to the *Report and Order*, the FCC retains the approximately one-third threshold for applying its initial spectrum screen to secondary market transactions, but has updated the types of spectrum it considers to be “suitable and available” for purposes of applying the screen. These updates are necessary because mobile wireless operators are now incorporating different bands into their networks for mobile telephony/broadband services and certain bands previously included in the spectrum screen are no longer considered “suitable and available”.

Specifically, the *Report and Order* makes the following changes:

Added to the spectrum screen:

- 40 megahertz of AWS-4;
- 10 megahertz of H Block;
- 65 megahertz of AWS-3, when it becomes available on a market-by-market basis;
- 12 megahertz of BRS;
- 89 megahertz of EBS; and
- The total amount of 600 MHz spectrum auctioned in the “Incentive Auction”.

Subtracted from the spectrum screen:

- 12.5 megahertz of SMR; and
- 10 megahertz that was the Upper 700 MHz D Block.

The modified spectrum screen includes 580.5 megahertz of spectrum (not counting 600 MHz spectrum because nobody knows yet how much of it will become available in the Incentive Auction). Thus, for most markets, secondary market transactions implicating 194 megahertz, or approximately one-third, of the suitable and available spectrum in a market would trigger the spectrum screen. The trigger would be adjusted for certain markets where AWS-1 or BRS/EBS spectrum are not available, and therefore would not be counted for purposes of the spectrum screen, as well as AWS-3 spectrum on a market-by-market basis (since the AWS-3 auction has not yet occurred).

While the *Report and Order* did not specifically adopt a separate screen for low-band (below 1 GHz) spectrum holdings, the FCC did forewarn that it will evaluate low-band spectrum holdings as an “enhanced factor” under its case-by-case review of secondary market transactions. Basically, absent factors to the contrary, any transaction that would result in an entity holding approximately one-third or more of “suitable and available” low-band spectrum will more likely be found to cause competitive harm in the FCC’s case-by-case review. Transactions involving an entity that already holds one-third or more of low-band spec-

trum would cause the FCC even greater concern and, presumably, have an even lower chance at approval. (This warning is most likely targeted at Verizon and AT&T who, together, hold approximately 73 percent of the low-band spectrum in the U.S.)

Spectrum Holding Limits for Auctions

The *Report and Order* establishes a new regime whereby the FCC will determine whether to adopt a spectrum holding limit prior to licensing of spectrum through competitive bidding (*i.e.*, auctions). Specifically, the FCC will replace its case-by-case analysis with consideration of whether acquisition of licenses at auction “would potentially harm the public interest by reducing the likelihood that multiple service providers would have access to sufficient spectrum to compete robustly in the provision of mobile telephony/mobile broadband service.” Among other things, this determination will be based on “the extent to which com-

petitors have opportunities to gain access to alternative bands that would serve the same purpose as the spectrum licenses at issue.” The FCC plans to apply this new policy to two auctions on the horizon, AWS-3 and the Incentive Auction for 600 MHz spectrum.

Because AWS-3 is high-band spectrum, and there is apparently sufficient availability of comparable high-band spectrum for multiple providers to utilize, the FCC declined to adopt any spectrum holding limits to the upcoming AWS-3 auction.

Conversely, the Incentive Auction involves low-band spectrum, which is in shorter supply and has unique characteristics (*e.g.*, better signal propagation leading to enhanced coverage and lower deployment costs). Accordingly, the FCC has “reserved” up to (*i.e.*, a maximum) 30 megahertz of 600 MHz band spectrum in each license area for entities that do not currently hold a significant amount of below 1 GHz spectrum.

The *Report and Order* sets the eligibility threshold at “less than 45 megahertz, on a [county-by-county] population-weighted basis, of suitable and available below 1 GHz spectrum in a [Partial Economic Area].” All licensed spectrum as well as long-term leasing arrangements (attributed to both lessor and lessee) are included in the calculation of below 1 GHz spectrum holdings. The 45 megahertz threshold is derived by taking approximately one-third of the 134 megahertz of below 1 GHz spectrum (cellular, 700 MHz, and SMR) counted in the modified spectrum screen discussed earlier.

The FCC will evaluate low-band spectrum holdings as an “enhanced factor”.

(Continued on page 13)



(Spectrum Holding Policies - Continued from page 12)

Generally, bidders exceeding this 45 megahertz low-band spectrum threshold will not be permitted to bid on reserved licenses. However, this threshold appears to apply only to the “nationwide” carriers (a universe defined by the FCC to consist of Verizon, AT&T, Sprint and T-Mobile). In other words, the FCC will still permit bidding on reserved licenses by “regional and local service providers in all PEAs, including those where such a provider [exceeds the 45 megahertz low-band threshold].” Why? Because these non-nationwide providers “enhance competitive choices for consumers in the mobile wireless marketplace, and help promote deployment in rural areas” and present a lower risk of denying access to low-band spectrum to competitors. In short, non-nationwide providers will be able to bid on all reserved spectrum while nationwide providers can bid on reserved spectrum only if they do not exceed the 45 megahertz threshold in the license area.

The amount of spectrum actually reserved, up to a maximum of 30 megahertz, will vary depending on a several factors, including: the amount of spectrum licensed in the initial stage; the amount of spectrum that reserve-eligible bidders demand at the end of a previous stage of bidding; and the amount of spectrum demanded by reserve-eligible bidders when the auction reaches a trigger. Until the trigger is met, all bidders will compete for generic licenses. (The FCC gives this as an example: “For in-

stance, if the spectrum reserve trigger is met in a stage with a maximum of 30 megahertz of reserved spectrum, if reserve-eligible bidders demand only 20 megahertz in a given PEA at those prices when the trigger is met, then 20 megahertz will be reserved.”) Moreover, the FCC intends to clarify (after an opportunity for the public to comment) that reserve-eligible bidders can’t acquire more than 20 megahertz of reserved spectrum in a market unless there is another reserve-eligible bidder in that market.

Finally, the *Report and Order* also adopts secondary market restrictions on 600 MHz licenses for a period of six years (to match the interim buildout period) post-auction. In the FCC’s view, these restrictions are necessary to ensure that its goals of facilitating access to 600 MHz band licenses and preventing excessive concentration of low-band spectrum are not undermined. For reserved spectrum, entities will not be able to transfer, assign or enter into long-term leases regarding those licenses with entities that were not reserve-eligible bidders in the Incentive Auction. Moreover, for six years, no 600 MHz band licenses (reserved or un-reserved) can be transferred, assigned, or leased (long-term) if such a transaction would result in the acquiring entity holding approximately one-third or more of low-band spectrum in a market.

Additional details about the unequal treatment of low-band versus high-band spectrum can be found in the FCC’s full, 144-page, [Report and Order](#).



(AWS-3 Auction - Continued from page 4)

reserve is not reached, the auction fails, and only a month is left before the February deadline mandated by Congress?

A major question mark for prospective bidders is the degree to which the spectrum will be encumbered either permanently or temporarily by existing federal users. NTIA is supposed to provide this information well before the auction begins so that bidders can know what they are bidding on, but the Federal government is not known for acting with alacrity, and here numerous Federal agencies with nothing to gain must hop to it in the very near future.

In its [Report and Order on the new “spectrum screen” rules](#), the Commission declared that AWS-3 auction bidders will be free from any spectrum acquisition constraints imposed by the new screen levels. In other words, bidders get a freebie to acquire as much as they want in this auction without worrying about spectrum

aggregation constraints. It is difficult to see how this curious one-time act of largesse squares with any reasoned policy of limiting spectrum concentration, but that is what it has decided. The main beneficiary of this gift would appear to be Sprint, which already approaches the spectrum screen threshold in many markets by virtue of its Broadband Radio Service and Educational Broadband Service holdings. Its long-standing passion to acquire T-Mobile would confuse the situation further if that transaction is applied for and is pending while the auction is conducted.

Finally, we would be remiss if we failed to note that AWS-3 is being rolled out *after* AWS-4, which followed AWS-1. AWS-2 will presumably arrive sometime after AWS-3. Got it?

Comments on the FCC’s proposed Auction 97 rules were due by **June 9, 2014**, with replies due no later than **June 23**. They may be uploaded at the FCC’s [online ECFS filing site](#); use Proceeding No. 14-78.



(Net Neutrality - Continued from page 1)

works differently. The previous version of this rule flatly prohibited ISPs from

“unreasonably discriminating” among content providers;

- continue to look to [Section 706 of the Communications Act](#) for the statutory authority to adopt net neutrality rules. The Commission does, however, ask whether it should instead rely on Title II of the Act to support the reclassification of broadband Internet access service, and possibly ISP service to content providers, as telecommunications services subject to common carriage regulation.

A Brief History of Net Neutrality

Some historical background may be useful before we delve into the *NPRM* in greater detail.

In 2002, the FCC declared cable broadband ISPs to be free of Title II/common carrier-based regulation; it did the same for telephone broadband ISPs in 2005.

Also in 2005, the FCC adopted an [Internet Policy Statement](#) setting out four “principles” designed to “preserve and promote” an Open Internet.

The 2005 Policy Statement got its first test in 2008, when [the Commission found that Comcast had deliberately and maliciously interfered](#) with some customers’ usage of Internet peer-to-peer applications. The FCC claimed that Section 706 of the Act authorized it to take this action. Earlier, however, in 1998, the FCC had expressly held that Section 706 did *not* constitute an independent grant of authority. Comcast appealed to the D.C. Circuit. In 2010, the court [struck down the FCC’s action](#) against Comcast, holding that, having never veered from its 1998 view of Section 706’s limits, the Commission could not without explanation suddenly rely on Section 706 as authority to regulate the management of broadband Internet traffic by ISPs.

In December of 2010, the Commission responded to the court’s *Comcast* decision by adopting an [Open Internet Order](#) announcing three basic rules:

- ☛ a transparency rule requiring both fixed and mobile ISPs to “publicly disclose accurate information regarding the network management practices, per-

formance, and commercial terms” of their broadband Internet access services;

- ☛ an anti-blocking requirements barring (a) fixed ISPs from blocking “lawful content, applications, services, or non-harmful devices subject to reasonable network management” and (b) mobile ISPs from blocking access to lawful websites or “applications that compete with the provider’s voice or video telephony services,” subject to “reasonable network management”; and
- ☛ an anti-discrimination rule for fixed providers, barring them, also subject to “reasonable network management”, from “unreasonably discriminat[ing] in transmitting lawful network traffic.”

The Verizon court agreed that the FCC could find a grant of authority in Section 706.

The FCC again relied on Section 706 as the statutory authority for its 2010 Open Internet rules. But this time it acknowledged its earlier contrary view and explained its change of mind: Section 706 (a) generally urges the FCC to “encourage” the deployment of advanced (broadband) capability through regulatory or de-regulatory measures to promote competition or remove barriers to investment; and Section 706(b) re-

quires the FCC to take similar regulatory actions concerning the availability of advanced telecommunications if, after appropriate inquiries, it finds that such advanced services are not being deployed in a timely manner. Since the net neutrality rules are supposed to be encouraging broadband deployment and increasing the availability of advanced telecommunications, the FCC reasoned, Section 706 gives it the necessary authority.

Verizon appealed the 2010 *Open Internet Order*, arguing that Section 706 did not supply the required statutory authority to the FCC.

The good news for the Commission: in [its January, 2014 decision](#) the court concurred with the FCC, agreeing that it *could* find a grant of authority there.

The bad news for the Commission: the court held that Section 706 does not allow the FCC to impose common carrier-like regulations on entities – such as ISPs – that the FCC had previously declared not to be common carriers. Because the 2010 anti-blocking and anti-discrimination rules effectively treated ISPs like com-

(Continued on page 15)



(*Net Neutrality - Continued from page 14*)

mon carriers, the court struck down the rules. (It did allow the transparency rule to stand.)

The court's bottom line: the FCC must allow ISPs to negotiate with content providers and enter into "commercially reasonable" agreements that could include, by implication, paid prioritization.

What is paid prioritization, you ask? Hard to say for sure, since that hadn't been an option before the court's decision. But one could imagine an Internet content provider – like, say, Amazon – agreeing to *pay* an ISP – Verizon, for instance – to enhance the speed or other technical characteristics of Amazon's traffic to Verizon's subscribers. That could give Amazon an advantage over its competitors, an advantage net neutrality supporters refer to – perhaps pejoratively, perhaps enviously – as a "fast lane." They argue that Internet traffic not enjoying such "fast lanes" will necessarily be relegated to the "slow lane."

That, in turn (so the argument goes), would degrade consumers' experience in accessing non-fast lane content providers, thereby competitively disadvantaging content providers unable to pay for the enhancement.

The NPRM

In the wake of the *Verizon* decision, Wheeler (who had arrived at the Commission only about ten weeks earlier) had two options: get out of the net neutrality business (as the Republican Commissioners urged) or try again. While most observers expected him to try again, the *Verizon* court had obviously complicated that option, leaving the Chairman with a dilemma. Yes, the court had said that the FCC *could* rely on Section 706 to regulate net neutrality but, in doing so, could *not* treat ISPs like common carriers. Importantly, that meant the FCC would have to let ISPs enter into "commercially reasonable" agreements with content providers, agreements that might include paid prioritization.

When Wheeler suggested (in [one blog](#), then [another](#)) that he was open to that approach, the Internet "street" blew up, with even his fellow Democratic Commissioners rebelling publicly. So in the days leading up to the FCC's vote on the NPRM, he revised his proposal to follow the court's "road map", while simultaneously threatening to move the Commission toward a Title II-based common carrier approach that could prohibit paid prioritization.

While reliance on Title II would provide a stronger statutory basis for Open Internet rules, there is considerable resistance to that approach. Reclassifying ISPs as telecommunications carriers could potentially expose them to hundreds of pages of full-blown Title II telecommunications regulation, a prospect that runs against the grain of both Internet history and the free-wheeling Internet ethos. In the view of some (including many ISPs), it would also discourage the investment and innovation in the facilities that drive the Internet. And it would almost certainly trigger massive political and legal resistance from ISPs and Republican members of the House and Senate. Of course, if ISPs were treated as common carriers, they might be relieved of some telecom regulatory burdens through the forbearance process set out in [Section 10 of the Communications Act](#). But forbearance would not provide much regulatory certainty to ISPs, who might fear that a future FCC could un-do any grant of forbearance.

*What is paid prioritization?
Hard to say for sure.*

Wheeler's dilemma can be seen in the NPRM's discussions of the no-blocking rule and the prohibition on commercially unreasonable practices.

The No-Blocking Rule

Even though the court struck down the 2010 version of the no-blocking rule, the NPRM proposes retention of that rule, but with a "clarification". While "blocking" would be prohibited, ISPs and content providers would still be permitted to bargain for provision of enhanced service (*e.g.*, prioritization) above a minimum level of access to the ISP's subscribers. This would be consistent with the individualized bargaining approach suggested by the court as an alternative to *per se* common carriage treatment. And, similarly consistent with the court's analysis, under the clarified rule the terms of such service would have to be "commercially reasonable". The evaluation of "commercial reasonableness" would involve multiple factors, including the impact of the practice on competition, consumers, and "speech and civic engagement." Yet as an alternative, the NPRM seeks comment on whether the FCC should adopt a no-blocking rule that either itself *prohibits* ISPs from entering into priority agreements with content providers, or acts in combination with a separate rule prohibiting such conduct.

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(*Net Neutrality* - Continued from page 15)

It is surprising that the Commission would propose to adopt a rule identical to one struck down just months earlier. And while the Commission's proposed "clarification" would allow prioritization agreements, the specific language of the rule as proposed does not include any reference to that "clarification". Instead, the "clarification" about prioritization is simply a supplemental interpretation outside the text of the rule itself. It is far from clear that this will be sufficient to protect the rule in a court challenge. Notably, future Commissioners could modify the *interpretation* of the rule, without having to modify the rule itself – and, indeed, [Chairman Wheeler has already told Congress](#) that, in his view, paid prioritization would interfere with the Internet's "virtuous cycle" and, as a result, be "commercially unreasonable".

Furthermore, if the FCC wished to prohibit any and all prioritization, the *Verizon* case indicates that it would presumably have to classify ISPs as telecommunications carriers to be regulated under Title II. Yet ISPs such as AT&T have [already made a case](#) that Title II does not itself require an absolute bar to disparate treatment of content providers. Rather, it prohibits only "unjust and unreasonable" discrimination or prioritization. That is, Title II allows telecommunications carriers to offer different terms and conditions to different customers (for instance, content providers) as long as those terms and conditions are made available to similarly situated customers. A blanket bar on prioritization would go beyond even the mandate of Title II.

Prohibition on Commercially Unreasonable Practices

The rules struck down in the *Verizon* case flatly prohibited ISPs from "unreasonably discriminating" in their treatment of different content carried over their networks. The *NPRM* proposes a new more "flexible" rule prohibiting only "commercially unreasonable" practices resulting in disparate treatment of different content. This would act both as a factor in evaluating violations of the no-blocking rule and, separately, as a supplemental protection in cases where a practice complies with the no-blocking rule but still may be deemed harmful. While the *NPRM* seeks comments on factors to be used in evaluating the commercial reasonableness of a prioritization practice (impact on competition and consumers, consistency with industry practice), it also seeks comments on whether prioritization agreements should be flatly banned under this rule. The *NPRM* concedes that such a ban would require regulating ISPs under Title II – illustrating that the "commercially unreasonable" pro-

vision is subject to essentially the same conundrum as the proposed no-blocking rule.

The Transparency Rule

In addition to the proposed rules regarding no-blocking and unreasonable commercial practices, the Commission is proposing to enhance the transparency rule that the *Verizon* court upheld. That rule currently requires ISPs to:

publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

The *NPRM* would expand that to require disclosure of specific data regarding transmission speed, latency and packet loss. This is apparently in response to a common consumer complaint that some ISP-advertised speeds seem faster than the speeds actually delivered. The *NPRM* also asks whether there is additional information that ISPs should have to disclose both to content providers and to the carriers between the content provider and the ISP.

Should the FCC create an agency "ombudsperson"?

To enforce the new rules, the FCC is considering a requirement that ISPs annually certify compliance. In addition, the Commission asks whether it should create an FCC "ombudsperson" to whom complaints (from consumers and "Internet entrepreneurs", including mainly small start-ups and edge providers) could be addressed and who could, where warranted, "investigate and represent [the complainants'] case."

The FCC's meeting, and the *NPRM* and accompanying statements that emerged from that meeting, reflect deep divisions within the Commission and, indeed, across the public. The only point everyone seemed to agree on: the hyperbolic rhetoric that what's at stake in this Open Internet proceeding is nothing less than "the future of the Internet." Historically, the Internet has managed to survive and thrive despite similar overwrought claims, and it's doubtful – at least to this author – that the fate of the Internet hangs on this decision. Of course, new FCC rules will have real consequences, but unquestionably, emotions and political rhetoric have been elevated to an extraordinary level in this proceeding. We expect more of the same as it progresses.

(Continued on page 17)



(Wireless Microphones - Continued from page 3)

censed use of wireless microphones up to 50 milliwatts – plenty for most churches and high-school auditoriums (and the FCC meeting room). [Later in 2010](#), the FCC identified two vacant TV channels in each market for wireless microphone use, closed these to TVWS devices, and clarified how both licensed and unlicensed microphones users could temporarily lock out TVWS devices from other channels, if needed, to protect certain performances.

An uneasy truce prevailed – until the FCC proposed a second TV spectrum repacking.

This one comes about because the same 6 MHz TV channel that used to carry one analog program can now carry multiple digital programs simultaneously. The [FCC plans an “incentive auction”](#) that will invite broadcasters to accept cash for sharing a TV channel or, if they prefer, for leaving the business altogether. Spectrum thus freed up will be auctioned for wireless broadband use, with some of the proceeds earmarked to pay off cooperating broadcasters. The result will be still fewer vacant channels for wireless microphones and TVWS.

The FCC’s recent [incentive auction order](#) further divides up the ever-smaller pie:

- ✎ The two channels now reserved for wireless microphones will become one, shared between wireless microphones and TVWS devices.
- ✎ The new wireless broadband spectrum will include a “duplex gap” 11 MHz wide between base and mobile frequencies. The FCC will set aside 6 MHz of this for TVWS and 4 MHz for licensed wireless microphones, primarily for covering breaking news events.
- ✎ Unlicensed wireless microphones may be permitted to use a guard band between 7 to 11 MHz wide that will separate TV from wireless operations, and possibly also channel 37 and additional guard bands around channel 37, at some locations. (Channel 37, used by radio astronomy at a limited number of sites and for medical telemetry, has never carried

TV programming.) Rules for this operation have not yet been adopted.

- ✎ Wireless microphones will be allowed to operate in closer geographic proximity to a TV station using the same channel, so long as they stay at least 4 km from the station’s predicted service contour – or even closer, if they coordinate with the TV station.
- ✎ The FCC has promised to improve the performance of the TVWS database, possibly allowing wireless microphone users to register events for protection on short notice. Details will follow in a later proceeding.

In [a separate order](#), the FCC expanded licensing eligibility for wireless microphones, now to include venues and professional sound companies that routinely use 50 or more wireless microphones. A production company that provides its own audio services would qualify. The FCC’s examples include indoor and outdoor seated facilities such as auditoriums, amphitheaters, arenas, stadiums, theaters, and houses of worship, as well as venues without fixed seating such as convention centers, conference locations, amusement parks, fairgrounds, entertainment complexes, athletic facilities, educational centers, and government locations. The venue does not have to own or operate the wireless microphones itself to qualify, but must routinely host large-scale productions that require 50 or more of these devices. A venue that includes multiple stages can count microphones by combining all stages at the same location.

Large productions typically use wireless microphone gear the audience does not see, including in-ear monitors for performers, “interruptible fold-back” for communicating with performers on air or on stage, and backstage intercoms – the iconic production person wearing a headset. All of these count toward the required minimum of 50. The FCC order also continues in force the waiver that allows unlicensed microphones to operate at 50 milliwatts or less, so that venues failing to make the minimum of 50 microphones still have the option of unlicensed use.

A later proceeding, not yet begun, will fill in a lot of the details. But even now, it is clear that users will have to replace equipment and adjust operations to work in a lot less spectrum than they had just a few years ago.



(Net Neutrality - Continued from page 16)

Comments in response to the *NPRM* are due no later than **July 15, 2014**; reply comments are due by

September 15. Comments may be uploaded to the [FCC’s ECFS filing website](#); use Proceeding No. 14-28. Please contact us if you have any questions or are considering participating in this proceeding.